

THE AUSTRALIAN

Tuesday, May 28, 2024 | Today's Paper | Mind Games

NSW Supreme Court judge Stephen Rothman urges Anthony Albanese to grant 'positive rights' to faith schools

EXCLUSIVE

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REPORTER

UPDATED 7:41AM APRIL 13, 2024, FIRST PUBLISHED AT 10:00PM APRIL 12, 2024 •  309 COMMENTS

The author of the Albanese government's blueprint to reduce discrimination at faith-based schools says religious employers need more legal protection to adhere to their doctrines and hire staff who share their values.

NSW Supreme Court judge Stephen Rothman, who led the Australian Law Reform Commission's review of discrimination at religious schools, said faith employers needed a religious discrimination bill that included a "positive right" to hire staff based on their ethos.

Justice Rothman said the ALRC report released by the Albanese government last month, which proposed removing a section of the Sex Discrimination Act that allowed schools to discriminate on the basis of sexual orientation and gender identity, was "constrained" by the terms of reference set by Attorney-General Mark Dreyfus.

The "positive right" proposal would go further in protecting faith institutions than what the government is proposing in a draft bill of its religious discrimination act, according to sources. The government's draft bill has not been publicly released.

"If there weren't the constraints associated with the (ARLC) report and you were looking at religious discrimination more generally then they should have a positive right," Justice Rothman told The Weekend Australian on Friday.

"The (legislation) would simply say it's lawful for a religious education institution to discriminate in favour of a person on the basis of their religious beliefs or adherence to religious tenets."

He warned that people of faith felt "under attack and therefore insecure", arguing a positive right should protect religious institutions adhering to their key doctrines. This would include allowing schools to direct teachers to adhere to church teachings when asked by their students about marriage, abortion and euthanasia.

It would also provide religious groups with protection over anti-discrimination laws overseen by state governments.

"I don't think anyone should feel insecure because they believe in a religion," Justice Rothman said. "I also think that a positive right would allow people not to become too technical about the kind of discrimination that was occurring."

The ARLC was tasked with providing advice to government on how to deal with section 38 of the Sex Discrimination Act, which allows religious schools to discriminate on the basis of sex, sexual orientation, gender identity or relationship status.

The ALRC recommended removing section 38 of the SDA altogether and winding back protections for religious institutions in the Fair Work Act.

It was not allowed to advise on how the religious discrimination act should be drafted, although the report acknowledged the government was planning to introduce these laws alongside reforms to the SDA.

Sources said Labor's bill did not include a positive right for religious groups but used the legally weaker "exception" model, stating religious groups were allowed to discriminate in some ways.

Justice Rothman spoke to The Weekend Australian after he delivered a speech on the issue at the University of Notre Dame on Friday, in which he described himself as a person of faith.

University of Notre Dame law expert Mark Fowler said it was clear Justice Rothman was constrained by the terms of reference the government provided the ALRC. "Those terms sought to achieve a particular political outcome," Dr Fowler said. "In disclosing his own view his remarks today have overrun the ALRC's report.

He said a bill with positive rights would be an "important recognition of an equal status of religious freedom and a recognition it is not discriminatory".

"An exception says it is discriminatory but you can do it anyway, and that is why it is a second-order right," Dr Fowler said.

The removal of section 38 and creation of separate religious freedom protections have been resisted by faith groups, which argue there would be restrictions imposed on their schools so that teachers who weren't of the same faith could be hired for non-religious subjects.

Archbishop of Melbourne Peter Comensoli and Anglican Bishop of South Sydney Michael Stead said last month the ALRC's recommendations fell short of meeting the government's election promises.

Anthony Albanese said last month he would not progress with any religious discrimination reforms unless [he received bipartisan support](#), but he later left the door open to negotiating with the Greens to pass legislation through the Senate.

Coalition MPs have said they would oppose the removal of section 38 of the SDA, while opposition legal affairs spokeswoman Michaelia Cash said she was concerned by the government's proposals.

Mr Albanese met religious and education groups in Sydney on Friday, telling faith leaders that schools choosing to employ people of the same faith did not represent discrimination and backing in their rights to hire in line with their beliefs.

Australian Association of Christian Schools executive officer Vanessa Cheng said she had been reassured by the meeting, attended by Mr Dreyfus, with Mr Albanese pledging he would take the nation forward on religious protections, not backwards.

"The message we gave the Attorney-General and Prime Minister was that the current legislative package the government is proposing is a long way from taking us forward," she said.

“And as it currently stands it would remove the protection for religious schools rather than provide clarity and confidence for our sector.”

The Weekend Australian understands Mr Albanese did not directly address if he would act on recommendations that section 38 of the SDA be removed.

He also restated his desire to avoid igniting a “divisive debate” and his wish for bipartisan support from the Coalition to move ahead, while signalling that he could release copies of the legislation to stakeholders.

Liberal senator Michaelia Cash said it was time for Mr Albanese to release his - religious discrimination legislation.

A spokesman for Mr Dreyfus said the government would seek to enhance protections in anti-discrimination law in a way that “brings Australians together”.

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Greg Brown is the Canberra Bureau chief. He previously spent five years covering federal politics for The Australian where he built a reputation as a newsbreaker consistently setting the national agenda.... [Read more](#)



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